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IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 161

CLINTON FOODS INC., *Claimant,* and CLINTON FOODS INC., a Corporation, *Petitioner,*

v.

UNITED STATES OF AMERICA

and

HONORABLE BEN MOORE, *Judge,* United States District Court for the Southern District of West Virginia

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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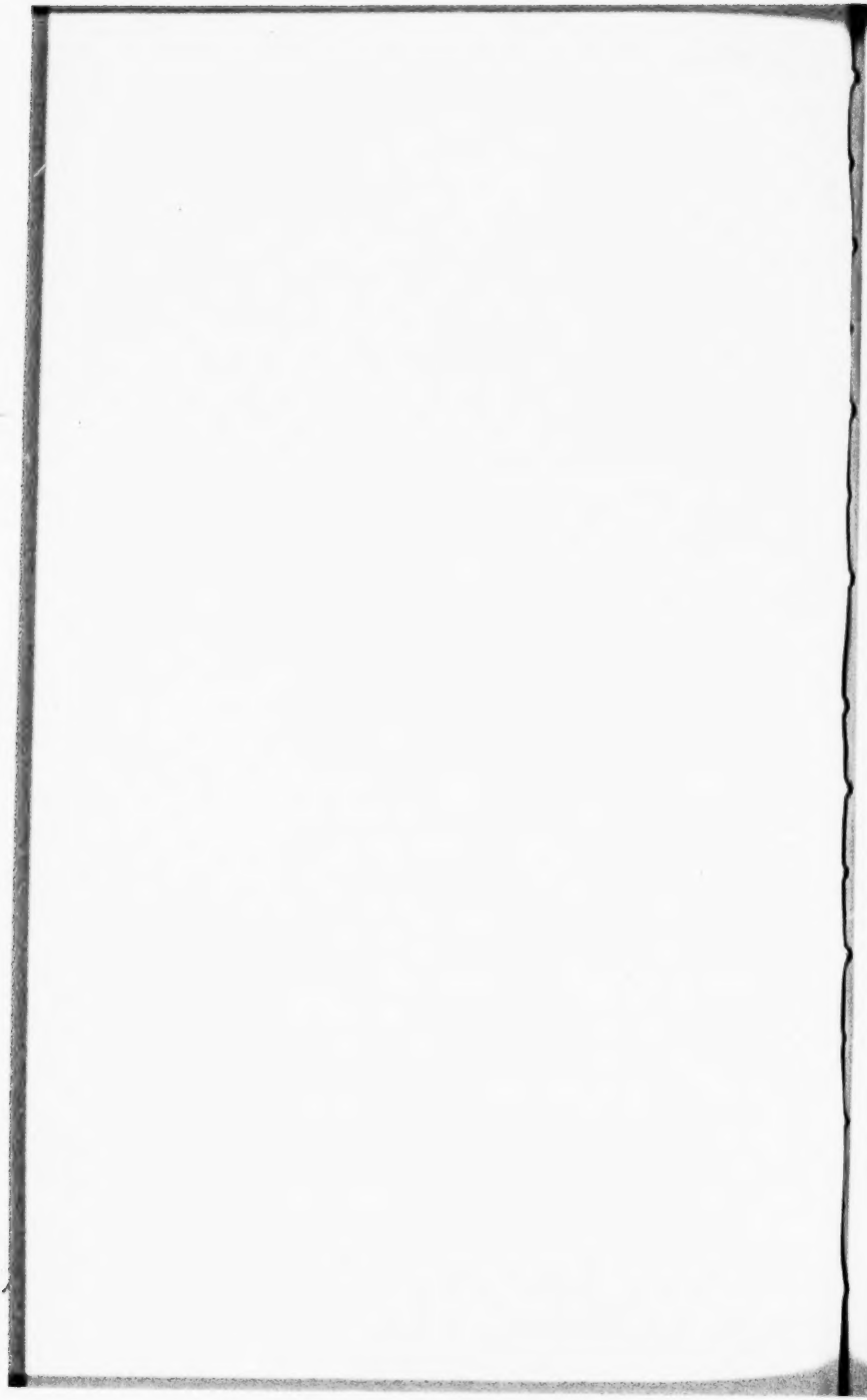

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

PRELIMINARY

The petitioner, Clinton Foods Inc., respectfully represents that it is aggrieved by the decision and final judgment of the United States Court of Appeals for the Fourth Circuit rendered on the 2nd day of April, 1951.

In its decision, in its case No. 6209, the Court of Appeals disposed of an appeal by your petitioner from an order of the United States District Court for the Southern District

of West Virginia and also, in its Case No. 6210, of a petition for a writ of mandamus filed in the Court of Appeals by your petitioner. Both the appeal and the petition for writ of mandamus sought relief from a prior order entered by the District Court in a case brought under the provisions of 21 U. S. C. Sections 334, 342(b)(4) and 353(a), styled *United States of America, Libellant,* v. *630 Cases of Orangeade, Clinton Foods Inc., Claimant.* In its order the District Court denied your petitioner's motion for a change of venue to a more convenient forum, holding that it had no power to grant such a change of venue and refusing to consider the merits of the motion.

Both the appeal and the petition for writ of mandamus involved the same questions and were briefed, heard and disposed of together in the Court of Appeals; therefore, a single Certiorari application is hereby made. Your petitioner prays for the allowance of a writ of Certiorari directed to the Court of Appeals for the Fourth Circuit and that the matters involved be heard together in this Court.

OPINION BELOW

The opinion of the Court of Appeals appears in the record (R. 31-38) and is officially reported in 188 F. 2d 289. The District Court rendered no written opinion. Its order overruling petitioner's motion for a change of venue appears in the record (R. 21a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTION PRESENTED

The question presented by this case is whether a libel brought by the United States of America against a food product under the provisions of the Federal Food, Drug

and Cosmetic Act (21 U. S. C. Sec. 301 et seq.), charging both misbranding and economic adulteration, may, on motion of the owner of the libeled product, be transferred to a more convenient forum under the provisions of 21 U. S. C. Section 334(a) and 28 U. S. C. Section 1404(a).

STATUTES INVOLVED

The pertinent provisions of the Federal Food, Drug and Cosmetic Act (21 U. S. C. Sec. 301 et seq.) are as follows:

> "Sec. 334. Seizure—Grounds and Jurisdiction
>
> "(a) *Any article of food,* drug, device, or cosmetic *that is adulterated or misbranded* when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, or which may not, under the provisions of section 344 or 355, be introduced into interstate commerce, *shall be liable to be proceeded against* while in interstate commerce, or at any time thereafter, *on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: Provided, however, That no libel for condemnation shall be instituted under this chapter for any alleged misbranding if there is pending in any court a libel for condemnation* proceeding under this chapter *based upon the same alleged misbranding, and not more than one such proceeding shall be instituted* if no such proceeding is so pending, except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this chapter, or (2) when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous

to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. *In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial."**

"(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. When libel for condemnation proceedings under this section, involving the same claimant and the same issues of adulteration or misbranding, are pending in two or more jurisdictions, such pending proceedings, upon application of the claimant seasonably made to the court of one such jurisdiction, shall be consolidated for trial by order of such court, and tried in (1) any district selected by the claimant where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties. If no order for consolidation is so made within a reasonable time, the claimant may apply to the court of one such jurisdiction,

*Those portions of this subsection relevant to the controversy at hand have been italicized.

and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, in which all such pending proceedings shall be consolidated for trial and tried. Such order of consolidation shall not apply so as to require the removal of any case the date for trial of which has been fixed. The court granting such order shall give prompt notification thereof to the other courts having jurisdiction of the cases covered thereby."

"(f) In the case of removal for trial of any case as provided by subsection (a) or (b)—

"(1) The clerk of the court from which removal is made shall promptly transmit to the court in which the case is to be tried all records in the case necessary in order that such court may exercise jurisdiction.

"(2) The court to which such case was removed shall have the powers and be subject to the duties, for purposes of such case, which the court from which removal was made would have had, or to which such court would have been subject, if such case had not been removed."

The pertinent provisions of the Federal Judiciary Act (28 U. S. C.) are as follows:

"Sec. 1291. Final decisions of district courts

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

"Sec. 1345. United States as plaintiff

"Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

"Sec. 1356. Seizures not within admiralty and maritime jurisdiction

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction."

"Sec. 1395. Fine, penalty or forfeiture

"(b) A civil proceeding for the forfeiture of property may be prosecuted in any district where such property is found."

"Sec. 1404. Change of venue

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

"(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer."

STATEMENT OF THE CASE

The proceedings below were started by the United States of America in the United States District Court for

the Southern District of West Virginia by filing a libel against 630 cases of orangeade located in a warehouse in Charleston, West Virginia, within the Southern District of West Virginia, where they had been brought from Dunedin, Florida. The libel alleges that the seized product is misbranded and adulterated (in the economic sense) in violation of the provisions of the Federal Food, Drug and Cosmetic Act (21 U. S. C. Sec. 301 et seq.) and prays that all persons having an interest in the seized product be cited to appear to answer the libel and that the Court decree condemnation of the product (R. 8a).

Thereafter, on the same day, pursuant to a monition of attachment issued by the District Court to the United States Marshal the 630 cases of orangeade were seized in Charleston, West Virginia. Clinton Foods Inc. intervened as Claimant and filed an original and amended claim and answer. This amended claim and answer, *inter alia*, denied violation of the Federal Food, Drug and Cosmetic Act (R. 12a).

In due course, Clinton Foods Inc. filed its written motion for a change of venue under the provisions of Section 334 of the Food, Drug and Cosmetic Act (21 U. S. C. Sec. 334) and Section 1404(a) of the Judiciary Act (28 U. S. C. 1404(a)) (R. 17a). Clinton Foods Inc. and the Government filed affidavits relating to the convenience of the forum (R. 17a, 19a). The District Court refused to receive or consider any evidence relating to the convenience of the forum and refused to consider Claimants' motion for a change of venue on its merits. The Court based its decision upon the ground that the action, being *in rem*, is not transferable under any statute relating to change of venue (R. 21a).

Your petitioner perfected its appeal to the Court of Appeals for the Fourth Circuit from the order of the District Court refusing to consider, on its merits, its

motion for a change of venue. At the same time it filed its petition for a writ of mandamus against Honorable Ben Moore, Judge of the United States District Court for the Southern District of West Virginia, praying that he be ordered to consider proper evidence relating to the convenience of the forum. The Court of Appeals dismissed the appeal and denied the writ of mandamus (R. 38).

SPECIFICATION OF ERRORS

The Court of Appeals erred:

1. In holding that the order of the District Court overruling your petitioner's motion for a change of venue is not appealable under the provisions of 28 U. S. C. Section 1291;

2. In holding that the libel action is not transferable under the provisions of 21 U. S. C. Section 334(a);

3. In holding that the libel action is not transferable under the provisions of 28 U. S. C. Section 1404(a).

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *COHEN* V. *THE BENEFICIAL INDUSTRIAL LOAN CORPORATION*, 337 U. S. 541 (1949).

In the recent well considered case just cited, this Honorable Court said, in discussing 28 U. S. C. Section 1291:

> "The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. *But the District Court's action upon this application was*

concluded and closed and its decision final in that sense before the appeal was taken.

"Nor does the statute permit appeals, even from duly consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. *But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably.* We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.

"This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, *rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.* The Court has long given this provision of the statute this practical rather than a technical construction. * * *" (Italics added.) 337 U. S. at 546.

So in the instant case the question of change of venue in the interest of economy and convenience will have become moot after final judgment on the merits. At that time the extent of the unnecessary expenses incurred will be determinable, the inconvenience and hardship will have been demonstrated, but nothing can be done about it.*

---

* See *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329, 330 (C. A. 2d 1950), *cert. den.*, —— U. S. ——, 71 S. Ct. 79, 95 L. Ed. Adv. Ops 39 (1950).

The Court of Appeals simply failed to meet the issues posed by the realities of the situation. In an *ipse dixit* fashion it simply held that the *Cohen* case "is clearly not in point" (R. 34). It dismissed your petitioner's effort to procure a hearing upon the merits of the question of hardship necessarily resulting from trial in the forum chosen by the Government with the mere assertion that "there is absent here a 'final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.'" (R. 34). This, we submit, simply begs the question.

II

THE INSTANT PROCEEDINGS PRESENT QUESTIONS OF GREAT PUBLIC INTEREST IN THE INTERPRETATION OF THE FEDERAL FOOD, DRUG AND COSMETIC ACT, 21 U. S. C. SECTION 334, WHICH HAVE NOT HERETOFORE BEEN PASSED UPON BY THIS COURT.

The portions of the Federal Food, Drug and Cosmetic Act upon which we rely are 21 U. S. C. Sections 334(a), (b) and (f). They are, we submit, to be read and considered together. Insofar as they authorize seizure of chattels, in advance of an adjudication of the legal rights of the owners of such chattels, their provisions are in derogation of Common Law and should, we submit, be strictly construed. Insofar as these same sections of the statute deal with the procedure laid down for a determination of the respective rights of the parties, their terms should, *per contra*, be liberally construed in aid of an expeditious, inexpensive and fair determination of the very right of each case.

1. The procedural provisions of Section 334(a) authorize the transfer sought by your petitioner.

Divested of inapplicable parts, this section reads as follows:

"Any article of food * * * that is adulterated or misbranded * * * shall be liable to be proceeded against * * * on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: *Provided, however,* that no libel for condemnation shall be instituted under this chapter for any alleged misbranding if there is pending in any court a libel for condemnation * * * based upon the same alleged misbranding, and not more than one such proceeding shall be instituted * * *. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial." 21 U. S. C. Sec. 334(a).

A careful reading of the above quoted subsection reveals that:

(a) In *any* case where the number of libels for condemnation is limited to one proceeding it can be transferred to a more convenient forum;

(b) Only one libel may be maintained against the same product based upon the same charge of misbranding;

(c) A misbranding case may, therefore, be transferred to a more convenient forum. So also may any other case

brought under the section in which the number of libels permitted is limited to one;

We submit that the foregoing leads to the logical conclusion that,

(d) The seizure provision being in derogation of the Common Law must be strictly construed, therefore, only one seizure may be made on the basis of the same combined charge of misbranding and adulteration;

(e) The number of seizures being so limited by the terms of the act, such a case is transferable.

But the libellant says it has put it beyond the power of the courts to grant such a transfer to a more convenient forum, however meritorious the grounds for transfer, because it has charged in the instant proceedings *both* economic adulteration *and* misbranding.

Conceding, for argument's sake, the right of libellant to join with a charge of misbranding a charge of economic adulteration, why should the joint libel partake, for change-of-venue purposes, solely of the restrictive attributes of the economic adulteration case rather than the more manageable and equitable characteristics of the misbranding case?

The Court of Appeals, devoting but a single sentence to this subject, so held "* * * because adulteration along with misbranding is charged in a single libel" (R. 38), thus again merely begging the question.*

It says that a Government Bureau Chief may, by the mere device of charging *both* economic adulteration and misbranding, choose the forum in a food seizure case,

*The Court of Appeals cites *United States of America* v. *11 Cases, etc., Ido-Pheno-Chon*, 94 F. Supp. 925 (D. Ore. 1950) as stating a "rule". That case, however, merely makes the bald statement that joining a non-transferable adulteration case with a transferable misbranding case makes the joint case non-transferable, without assigning reasons.

however great the inconvenience to the citizen involved, and that the courts are powerless to relieve the situation.

This, in spite of the fact that the statutory criteria of transferability is whether multiple libels will lie in the case in question. As was pointed out at the outset, the *seizure provisions of the Food and Drug Act are in derogation of the Common Law and must be strictly construed.* So construed, the Act does not permit multiple libels for *misbranding and "adulteration"* because the very words of the Act expressly prohibit more than one proceeding for the same alleged misbranding. Therefore, this is a case "where the number of libel for condemnation proceedings is limited as above provided" and is removable under Section 334(a) of the Food and Drug Act.

Every argument, derived from the verbiage of the statute, which can be advanced in the instant case for holding a combined misbranding and economic adulteration case not transferable can and should be applied with redoubled force to prove it transferable. Being remedial, the transfer provisions should be liberally construed in favor of the power of the courts so to handle the question of transferability as to enable them to do justice in the matter as between the parties.

III

THE COURT OF APPEALS HAS REFUSED TO FOLLOW PRECEDENTS ESTABLISHED BY THIS COURT AND OTHER COURTS OF APPEALS AND HAS PLACED AN UNDULY RESTRICTIVE AND ERRONEOUS INTERPRETATION ON SECTION 1404(a) OF THE JUDICIARY ACT.

1. All District Courts, without respect to the territorial limits of their districts, have the power to try cases brought under the Food, Drug and Cosmetic Act.

Congress has conferred jurisdiction on the District Courts to try cases such as the present one without territorial limitation:

> "Except as otherwise provided by act of Congress, the *District Courts* shall have original jurisdiction of all civil actions, suits, or proceedings commenced by the United States, or by an agency or officer thereof expressly authorized to sue by act of Congress." 28 U. S. C. Section 1345. (Italics added.)
>
> "The *District Courts* shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States upon land or upon water not within admiralty and maritime jurisdiction." 28 U. S. C. Section 1356. (Italics added.)

The territorial area over which Congress exercised its legislative power in enacting the Food, Drug and Cosmetic Act was the United States, and it conferred in the above sections jurisdiction on the District Courts to enforce the statute enacted pursuant to this power without any express limitations upon the geographical area in which they are to fulfill this function. The logical conclusion to be reached is that the judicial power thus conferred without limitation is co-terminus in geographical area and coextensive in function with the legislative power exercised. The Food and Drug Act is effective throughout the United States. The power to enforce this Act conferred upon the District Courts by the Judiciary Act is also effective throughout the United States. The only requirement necessary to *jurisdiction* not referred to in the sections of the Judiciary Act set forth above is the obvious one that the article proceeded against must exist within the territorial limits of the United States.

The situation is one in which a Federal Court is enforcing a Federal law pursuant to an unlimited grant of jurisdiction by Congress. The attempt by the District Court and the Court of Appeals to place an artificial geographical limitation upon the jurisdiction thus conferred is not

warranted by the language of the legislation, the practical requirements of the case or the equities of the situation.

In 1912 this Court, holding that the basis of the District Court's jurisdiction over cases decided under the provisions of the Food, Drug and Cosmetic Act of 1906 was conferred by the Judiciary Act and not by the Federal Food, Drug and Cosmetic Act, said:

> "* * * We think this Act (Food and Drug) must be held to have been passed not to confer a new jurisdiction upon the District Court, but in recognition of the jurisdiction already created in seizures upon land and water, * *"
>
> *443 Cans of Frozen Egg Product* v. *United States of America*, 226 U. S. 172, 182 (1912).

The jurisdiction already conferred to which the Court refers was that conferred by the Judiciary Act of 1789 as amended:

> "* * Giving the District Court jurisdiction 'of all civil causes of admiralty and maritime jurisdiction * * * and of all seizures on land and on waters not within admiralty and maritime jurisdiction,' **". 226 U. S. at 181.

The most casual reading of the case last cited and the statute therein set forth shows that Congress intended all District Courts to have jurisdiction "of all seizures on land and on waters not within admiralty and maritime jurisdiction * *". In the same section of the Judiciary Act which contains the language just quoted jurisdiction is conferred upon the District Courts in other types of cases, and limited to "their respective districts." Such a limitation has never and does not now exist with respect to the jurisdiction of the District Courts to try cases involving seizures on land and on waters not within admiralty and maritime jurisdiction. If Congress had intended such a limitation, it would have used the ap-

propriate language "within their respective districts" contained in other portions of the same section of the Judiciary Act where such a limitation was desired.

The Court of Appeals has in the instant case refused to recognize the authority of the case last cited and has imposed by judicial fiat a limitation on the jurisdiction of the District Courts which the Congress obviously declined to impose.

2. Provisions for trial of cases such as this in the District in which the article is seized relate to venue only.

It is true that Section 334(a) of the Food, Drug and Cosmetic Act authorizes trial in the District in which the seizure is made, but this is very clearly a venue provision. Such is the holding of this Court in *443 Cans of Frozen Egg Product* v. *United States of America, supra.*

If this were not true, the present libel would be subject to dismissal on the authority of the case *The Brig Ann,* 9 Cranch 289 (U. S. 1815). The case last cited is authority for the proposition that, in actions *in rem* in which the *res* is jurisdictional, the *res* must be seized prior to filing a libel. Otherwise the case is subject to dismissal.

In a case under the 1906 Pure Food and Drug Act the Government filed a libel against 275 Cases of Tomato Catsup, and then seized the product. The claimant intervened and moved for dismissal on the grounds that the Court had no jurisdiction since the libel was filed prior to seizure of the offending product. The Court of Appeals reversed the District Court which had sustained a demurrer and dismissed the libel stating:

> "The proceeding before us was not in admiralty. The Food and Drug Act merely provides for conformity of all proceedings for confiscation thereunder as near as may be, to the proceedings in admiralty. Previous executive seizure is no part of admiralty proceedings. The language in ques-

tion, to our minds, falls far short of declaring by necessary implication that a condition precedent to jurisdiction in case of forfeitures under the laws relating to import, navigation or trade, viz, and executive seizure, is necessary to jurisdiction over judicial proceedings in confiscation under the Food and Drug Act. *Nor is there anything in the language of the present Judiciary Act which limits jurisdiction over condemnation proceedings in rem to the District where the property has been previously seized.*" (Italics added.)

United States of America v. *George Spraul & Co.*, 185 Fed. 405, 410 (C.C.A. 6th 1911).

It thus becomes apparent that the only limitation on place of trial in cases such as the instant case is the limitation contained in Section 334(a) of the Food, Drug and Cosmetic Act and perhaps that contained in Section 1395(b) of the Judiciary Act, both of which relate to venue.

This Court thus succinctly states the effect of venue statutes:

"* * the locality of a lawsuit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the court's power and the litigant's convenience is historic in the federal courts. * * * Section 51 *'merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election.'* * *" (Italics added.)

Neirbo Co. v. *Bethlehem Shipbuilding Co.*, 308 U. S. 165, 168 (1939).

3. The claimant, having moved for a change of venue, has waived its venue privilege and empowered the court to order the case transferred to any more convenient court having jurisdiction.

Section 1404(a) of the Judiciary Act reads as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."
>
> 28 U. S. C. Sec. 1404(a).

Both trial and appeal courts have in effect held that in the meaning of Section 1404(a) a civil action cannot be "brought" except where there is venue as well as jurisdiction. This is, we submit, an unsympathetic and erroneous interpretation of what was intended to be a remedial act. It is, moreover, an interpretation condemned in advance by this Court:

> "A suit is brought when in law it is commenced, and we see no significance in the fact that in the legislation of Congress on the subject of limitations the word 'commenced' is sometimes used, and at other times the word 'brought'. In this connection the two words evidently mean the same thing, and are used interchangeably."
>
> *Goldenberg* v. *Murphy,* 108 U. S. 162, 163 (1883).

See also:

> *United States of America* v. *Northern Finance Corp.,* 16 F. 2d 998 (C.C.A. 2d 1927).
>
> *Isaacks* v. *Jeffers,* 144 F. 2d 26 (C.C.A. 10th 1944).
>
> *Armstrong Cork Co.* v. *Merchants' Refrigerating Co.,* 184 Fed. 199 (C.C.A. 8th 1910).

Rule 3 of the Federal Rules of Civil Procedure provides:

> "A civil action is commenced by filing a complaint with the court."

Clearly, in view of the foregoing, this action "might have been brought" in the District Court for Maryland and, in the absence of an objection to venue by Claimant, there prosecuted to final judgment.

Such is the holding of a recent thoroughly considered decision of the Third Circuit Court of Appeals. In that case, suit was brought in Delaware against numerous defendants, as to some but not all of whom jurisdiction *but not venue* could have been had in Texas. All the defendants moved for transfer to Texas under Section 1404(a). The court held that an action could have been "brought" within the meaning of Section 1404(a) against all the defendants in Texas *even though venue as to some was lacking there.* The court held:

> "Suits embracing the identical subject matter could have been brought and, literally, 'might have been brought', by the plaintiffs against the defendants in any district court in Texas. Moreover, if brought, the suits could have been maintained unless there had been seasonable objection to the venue by the defendants, for service of process under Section 12 of the Clayton Act could have been found. * * *
>
> "By joining in the motion to transfer the defendants have waived any objection to Texas venue and have agreed to submit themselves to a Texas court. Therefore, suits embracing the same parties and the same subject matter could now be brought and maintained in Texas. Indeed they could have been brought in Texas on November 6, 1947 and March 29, 1948, the dates on which the actions were commenced in the District of Delaware, and

> *could have been maintained in Texas if no objection had been timely made to the venue.* The difference between the phrase 'might have been brought' of Section 1404(a) and that employed in this opinion, 'could now be brought', is no more than one of tense and grammar, the imperfect subjunctive as compared to the pluperfect subjunctive. Surely Congress did not intend the effect of an important remedial statute to turn upon tense or a rule of grammar." (Italics added.)
>
> *Paramount Pictures, Inc., et al* v. *Rodney,* 186 F. 2d 111, 114 (C. A. 3d 1951), *cert. den.,* 19 Law Week 3258 (1951)

Indeed from the language quoted it will be seen that the court there, under the canons of liberal interpretation, very properly held that the term "brought" may be viewed in retrospect, after the appearance and waiver of venue by defendants as to which there was theretofore no venue and, in the light of such waiver of venue, the word "brought" may in effect mean "might have been brought" or "could now be brought".

In the instant case your petitioner has come in, submitted itself as fully as a claimant can in such a seizure case to the jurisdiction of the district court and has moved for transfer to the District of Maryland. By so doing it waives any objection to venue in Maryland and offers effectively to acknowledge venue there. To argue that whereas this can be done in such a case as *Paramount Pictures, Inc.* v. *Rodney, supra,* but cannot be done in the instant case because of the mere fact that it is a seizure case, is to nullify the remedial purposes inherent in Section 1404(a) by illiberal interpretation.

IV

THERE IS GREAT PUBLIC INTEREST IN THE CLARIFICATION AND AUTHORITATIVE INTERPRETATION OF THE STATUTES INVOLVED.

Section 1404 of the Judiciary Act was enacted with a view to correcting a situation whereby plaintiffs were permitted unbridled control of the forum of litigation without regard to the hardship and inconvenience caused defendants and witnesses. We feel that the purpose of the reform embodied in Section 1404 was to shift this control from the interested plaintiff to a disinterested judge who could, in the exercise of sound judicial discretion, impartially examine the circumstances of the case, consider the convenience of the parties and their witnesses, and then order trial of the case in that forum which seemed to offer the most promise of a convenient, speedy, just and inexpensive determination of the case. Certainly this worthy purpose deserves to be implemented in every way possible, including a liberal interpretation by the courts. This honorable Court has heretofore recognized this obligation. *E. g., Ex parte Collett,* 337 U. S. 55 (1949); *United States of America* v. *National City Lines,* 337 U. S. 78 (1949).

Although Section 1404 is of the greatest importance in a very large percentage of all of the cases decided in the Federal Courts, confusion has arisen because of a lack of uniformity of interpretation by the courts. See Hon. Irving R. Kaufman, *Observations on Transfers Under Section 1404(a) of the New Judicial Code,* 10 F. R. D. 595. This confusion, with its attendant threat of costly delay in litigating a procedural matter prior to trial of the case on its merits, no doubt discourages many litigants from demanding the beneficial rights conferred by Section 1404. We feel that the restrictive interpretations adopted by some of the lower courts have deprived litigants of rights they were intended by Congress to have. Certainly

it is of the utmost importance that this honorable Court correct the situation which has thus arisen by giving an authoritative interpretation of this most important legislation.

Most of what has been said above with regard to Section 1404 of Judiciary Act can be said, with equal validity, about the transfer provisions of Section 334(a) of the Food, Drug and Cosmetic Act. Although this section is obviously applicable to only a specialized type of litigation, the type of litigation to which it is applicable is both important and extensive.* It is common knowledge that Food and Drug cases comprise one of the most time consuming and costly types of litigation. Trials lasting many days and requiring the attendance of many witnesses both lay and expert are common.† For this reason it is of the utmost importance that such cases be tried in the most convenient and economical forum. Our position with regard to the interpretation of Section 334(a) is simply this: Cases involving charges of both misbranding and adulteration are not expressly covered by the transfer terms of the section. A restrictive interpretation leads to the conclusion that the transfer provisions relating to adulteration should apply and render a case involving a combined charge not removable. On the other hand, a liberal interpretation leads to the opposite conclusion. We feel that the remedial nature of the transfer provisions entitle them to this liberal interpretation and that so interpreted they permit transfer of cases involving a combined charge of misbranding and adulteration.

---

* In 1950 the Government brought 1,184 seizure cases under the Food and Drug Act against less than 2 percent of 77,350 food, drug, and cosmetic firms subject to regulation under the act. ANNUAL REPORT OF THE FEDERAL SECURITY AGENCY, 1950.

† For example, in *United States of America* v. *88 Cases, etc. "Bireley's Orange Beverage"* No. 10,170 the printed record on appeal to the Court of Appeals for the Third Circuit was 473 pages long. The trial in the District Court was started on October 3, 1949 and concluded on October 27, 1949. That case is now in the process of being tried for a second time.

It is submitted that in view of the foregoing the proper meaning and interpretation of Section 334 of the Federal Food, Drug and Cosmetic Act and Section 1404 of the Judiciary Act are of national importance and concern. They are important not merely to the public officials who are charged with the administration and enforcement of the Food, Drug and Cosmetic Act and the industries which are regulated by this Act but to the public generally. Unless the conflict which exists between the Courts of Appeal of the Third and Fourth Circuits as to the meaning and interpretation of Section 1404 of the Judiciary Act is resolved, the precise scope and meaning of this statute will remain in serious doubt and be productive of continued litigation.

Wherefore it is respectfully submitted that this petition for writ of *certiorari* should be granted.

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June 26, 1951

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 161

CLINTON FOODS, INC., CLAIMANT, AND CLINTON FOODS, INC., A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA AND HONORABLE BEN MOORE, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 31-38) is reported in 188 F. 2d 289. The opinion of the District Court appears at page 21 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered on April 2, 1951 (R. 39). The petition for

writ of certiorari was filed June 30, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an order of a District Court denying a change of venue is appealable.

2. Whether a seizure action brought under Section 304 of the Federal Food, Drug, and Cosmetic Act charging adulteration and misbranding may be removed to another district for trial.

STATUTES INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, 21 U.S.C. 301 *et seq.*, provides in part:

> SEC. 304. (a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: *Provided, however,* That no libel for condemnation shall be instituted under this Act, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this Act based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall

not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act, or (2) when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial.

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case

shall be tried by jury. When libel for condemnation proceedings under this section, involving the same claimant and the same issues of adulteration or misbranding, are pending in two or more jurisdictions, such pending proceedings, upon application of the claimant seasonably made to the court of one such jurisdiction, shall be consolidated for trial by order of such court, and tried in (1) any district selected by the claimant where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties. If no order for consolidation is so made within a reasonable time, the claimant may apply to the court of one such jurisdiction, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, in which all such pending proceedings shall be consolidated for trial and tried. Such order of consolidation shall not apply so as to require the removal of any case the date for trial of which has been fixed. The court granting such order shall give prompt notification thereof to the other courts having jurisdiction of the cases covered thereby.

* * * * *

(d) Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the

provisions of this section, direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this Act or the laws of the jurisdiction in which sold: * * *

28 U.S.C. 1291 and 1404 provide as follows:

§ 1291. Final decisions of district courts—The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

§ 1404. Change of venue—(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been bought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

STATEMENT

Pursuant to Section 304 of the Federal Food, Drug, and Cosmetic Act the United States filed a libel of information in the District Court for the Southern District of West Virginia for the seizure and condemnation of a quantity of orangeade. The libel alleged that the product was misbranded and adulerated in violation of the provisions of the Act (R. 9-10). Clinton Foods, Inc., petitioner herein, appeared as claimant and filed a motion for a change of venue, requesting that the proceeding be transferred for trial to the United States District Court for the District of Maryland (R. 17). The motion for a change of venue was heard by the District Court and denied on October 6, 1950 (R. 21, 22).

Clinton Foods, Inc., thereafter appealed to the court below from the order of the District Court denying the motion for the transfer of the case (R. 25), and also filed a petition for a writ of mandamus to compel the Honorable Ben Moore, Judge of the United States District Court for the Southern District of West Virginia, to consider the motion for removal on its merits (R. 3-7). A motion to dismiss the appeal was filed by the United States (R. 25-26). The appeal, the petition for mandamus, and the motion to dismiss the appeal were all heard together (R. 30, 41). The court below dismissed the appeal on the ground that the order of the District Court was not appealable (R. 31-34),

and denied the petition for a writ of mandamus on the ground that the District Court had no power to transfer the cause (R. 35-38).

ARGUMENT

1. The court below followed the general and well-recognized rule that an order granting or refusing a change of venue is not a final decision within the purview of 28 U.S.C. 1291, and is not appealable. Petitioner asserts that the general rule has been modified by the decision of this Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, which held that the denial of a motion to require the plaintiff to post security for costs was appealable. This Court reached that conclusion on the ground that the motion was not a step toward final disposition of the merits of the case, would not be merged in its final judgment and that, unless the denial of the motion were reviewed, the rights conferred by the statute might be *irreparably lost*. The Court limited the application of this decision when it stated (p. 546): "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, * * *." It warned (p. 547), "But we do not mean that every order fixing security is subject to appeal."

In the instant case it cannot be said that the question of venue is a collateral or separate issue or that the denial of the change of venue would cause irreparable damage. At most, it can only cause

inconvenience. The *Cohen* case did not change the old established rule that an order on a motion for change of venue is not appealable, and the courts which have had the question before them since the *Cohen* case have consistently so held. *Jiffy Lubricator Co.* v. *Stewart-Warner Corp.*, 177 F. 2d 360 (C.A. 4); *Magnetic Engineering & Manufacturing Co.* v. *Dings Mfg. Co.*, 178 F. 2d 866 (C.A. 2); *Holdsworth* v. *United States*, 179 F. 2d 933 (C.A. 1); *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (C.A. 2); *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (C.A. 9).

Finally, it should be noted that the ultimate issue which is sought to be reviewed by petitioner is whether a seizure proceeding brought under Section 304 of the Federal Food, Drug, and Cosmetic Act is transferable to another district for trial. Since this question was determined by the court below in denying the petition for a writ of mandamus, the contention as to appealability becomes an abstract question not necessary to be determined.

2. Petitioner contends that Section 304(a) of the Federal Food, Drug, and Cosmetic Act should be liberally construed so as to permit a transfer of a seizure action charging both adulteration and misbranding.

It is, however, a long-settled concept in federal jurisprudence that the United States District Courts have only such jurisdiction as is expressly

vested in them by Congress. A District Court does not have inherent power to transfer or remove a case to another District Court.

As stated in *United States* v. *74 Cases, etc., C.C. Brand Oysters,* 55 F. Supp. 745, 747 (W.D. S.C.):

> In the absence of express statutory authority a district court does not have the authority to transfer a case to another district court for trial. See *Billings Utility Co.* v. *Federal Reserve Bank,* D.C.D. Mont. 1941, 40 F. Supp. 309; *Spies* v. *Chicago E.E.I.R. Co.,* C.C.S. D.N.Y., 1887, 32 F. 713; *In re Associated Gas and Electric Co.,* 2 Cir., 1936, 83 F. 2d 734. United States District Courts have no jurisdiction beyond that granted by Congress. *Applegate* v. *Applegate, D.C.,* 39 F. Supp. 887.

In Section 304(a) and (b), the Court will find the only statutory basis for removal of libel actions brought under authority of the Federal Food, Drug, and Cosmetic Act. Actually, Section 304(a) deals with removal of *a single libel action,* while Section 304(b) deals with consolidation and removal where libel actions are pending in two or more district courts and involve the same claimant and the same issues of adulteration or misbranding.

Since the instant case involves *a single libel action,* the Court must look to Section 304(a). Removal of a single libel action is authorized only

where the charge is misbranding. The language of Section 304(a) authorizing removal for trial is as follows:

> * * * In any case *where the number of libel for condemnation proceedings is limited as above provided* the proceedings pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon * * *. (Italics supplied.)

The same section *limits* the number of seizure actions which may be instituted by providing:

> That no libel for condemnation shall be instituted under this Act, for *any alleged misbranding* if there is pending in any court a libel for condemnation proceeding under this Act *based upon the same alleged misbranding,* and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply * * * (in stated cases). (Italics supplied.)

As is evident from the italicized provisions in Section 304(a), the only actions which may be removed under that section are those seizure actions in which the Government is limited to one proceeding based upon the same charge, namely, libel proceedings alleging misbranding. Reference to the final Congressional Conference Report on the Act clearly substantiates this view. House of Representatives Report No. 2716, Seventy-fifth Con-

gress, Third Session, Statement of the Managers on the Part of the House, declared at page 22:

> Change of venue when only one libel permitted.—*Under the House amendment where the number of libels for misbranding is limited to one proceeding,* such proceeding shall on application of the claimant seasonably made be removed for trial * * *. (Italics supplied.)

Since the only type of seizure action which is limited to one proceeding is an action in which the charge is misbranding, it follows that Section 304(a) does not grant authority to remove a single libel action in which the charge is *adulteration.* This was the explicit holding in *United States* v. *74 Cases, etc., C.C. Brand Oysters,* 55 F. Supp. 745 (W.D.S.C., 1944).

The instant libel proceeding is based upon charges of both adulteration and misbranding. Section 304(a) contains no provision limiting the Government to one action when both adulteration and misbranding are charged or authorizing a transfer of a single action in which such charges are made. Hence the general rule that a District Court does not possess such power in the absence of specific authority applies. The precise question of whether a single libel action charging both adulteration and misbranding may be removed by authority of Section 304(a) was presented in *United States* v. *11 Cases, etc., Ido-Pheno-Chon,* 94 F. Supp. 925 (D. Ore.), in which it is held that Sec-

tion 304(a) does not grant authority to transfer such an action.

The contention that Section 304 should be interpreted to mean that only one seizure may be made in a proceeding charging both misbranding and adulteration is in direct conflict with its clear language and would work a change in the section under the guise of construction. No rule of liberal construction justifies the interpretation of the language of the statute to mean something entirely different from its clear and obvious meaning. This Court has repeatedly said that the purpose of the food and drug legislation is the protection of the public, and that such legislation must be construed to support that purpose. See *Ewing* v. *Mytinger & Casselberry,* 339 U. S. 594, 601. In the seizure provisions, the law seeks, not only to keep contraband articles out of commerce, but to protect the consumer by their seizure and destruction before they reach the ordinary consumer channels. Several shipments may be made of the same article of food which is adulterated because of the presence of a poisonous ingredient. There is no limitation on the number of seizure actions since it is necessary that every such shipment be seized and proceeded against immediately, wherever found. To hold that the number of such proceedings must be limited where a charge of misbranding is included would in many cases defeat the provision for seizure and condemnation of dangerously adulterated articles.

28 U.S.C. 1404(a) provides that for the convenience of witnesses, etc., "a district court may transfer any civil action to any other district * * * where it might have been brought." As a basis for the contention that the court below placed an erroneous interpretation on Section 1404(a), petitioner states that all District Courts have the power to try seizure actions brought under Section 304 of the Federal Food, Drug, and Cosmetic Act; that the only requirement necessary to jurisdiction in any District Court is that the article proceeded against is capable of being found within the territorial limits of the United States. It is said that the provision in Section 304(a) of the Act, under which the article may be proceeded against and condemned "in any district * * * within the jurisdiction of which the article is found", relates to venue only. Therefore, petitioner argues, since this proceeding could have been instituted in the District of Maryland, and since the petitioner has waived the venue, a transfer is authorized under Section 1404(a).

The question of whether 28 U.S.C. 1404(a) may be applied to a seizure action brought under Section 304 of the Federal Food, Drug, and Cosmetic Act was presented in *Fettig Canning Company* v. *Steckler,* 188 F. 2d 715 (C.A. 7), certiorari denied 341 U.S. 951, in which it was held that Section 1404(a) cannot be applied to a seizure proceeding. In that case the shipment of the seized article

originated in the Southern District of Indiana to which removal was sought and the seizure action could have been instituted there if seizure had been made in that District. In this case the seized article had never even been in the District of Maryland to which district removal was requested. Faced with this obstacle, petitioner advances the startling proposition, noted above, that a seizure action may be brought in any district irrespective of where the article may have been found, and that the provision in Section 304(a) of the Federal Food, Drug, and Cosmetic Act fixing jurisdiction in seizure actions relates only to venue.

The jurisdiction of the District Courts for the seizure and condemnation of contraband articles under the Federal Food, Drug, and Cosmetic Act is prescribed in Section 304(a) of the Act, which provides that an adulterated or misbranded article may be condemned in any district court "within the jurisdiction of which the article is found."[1] The statute then provides for the filing of a libel of information and the issuance of a warrant of seizure or monition in accordance with admiralty

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[1] It is fundamental concept that inferior federal courts have only such jurisdiction as is expressly vested in them by Congress. *Teel* v. *Chesapeake & Ohio Ry. Co. of Virginia*, 204 Fed. 918 (C.A. 6); *United States* v. *74 Cases, etc., C.C. Brand Oysters*, 55 F. Supp. 745 (W.D.S.C.). See, also, *Chicot County Drainage District* v. *Baxter State Bank et al.*, 308 U.S. 371, 376; *United States ex rel. Carapa* v. *Curran*, 297 Fed. 946, 954 (C.A. 2).

procedure. If the article is found and seized within the district, the court of that district has the power to enter a decree for the condemnation and destruction of the res in accordance with the provisions in Section 304(d) and to issue such process as is necessary to effectuate the decree. The court's jurisdiction to proceed is dependent upon the actual seizure of the article; if the article is not found and seized, there is nothing with respect to which any jurisdiction can be exercised. The proceeding is, therefore, one in rem. The contraband article is considered to be the offender, and the judgment or decree under Section 304(d) is directed against the property seized. See *Hipolite Egg Co.* v. *United States,* 220 U.S. 45, 57; *443 Cans of Frozen Egg Product* v. *United States,* 226 U.S. 172.

A proceeding in rem against specific property is local in character. *Casey* v. *Adams,* 102 U.S. 66; *The Willamette,* 53 Fed. 602 (D. Wash). A basic fact essential to the exercise of jurisdiction is the court's actual or constructive possession; the res must be actually or constructively within the reach of the court. *United States* v. *Mack,* 295 U.S. 480, 484; *Strong* v. *United States,* 46 F. 2d 257 (C.A. 1); *The Brig Ann,* 9 Cranch 289. Such a proceeding must necessarily be brought in the court within the jurisdiction of which the article may be found, and where the article may be subjected to the jurisdiction and power of the court. District courts

have no jurisdiction of seizure actions in respect to seizures made in a district other than the place where the proceedings are instituted. *Keene* v. *United States,* 5 Cranch 304; *The Little Ann,* Fed. Cas. No. 8397; *The Octavia,* Fed. Cas. No. 10422, affirmed, 1 Wheat. 20; *United States* v. *396 Barrels, etc.,* Fed. Cas. No. 16502; *The Idaho,* 29 Fed. 187 (D. Ore.).

This suit could not have been instituted in the Maryland District because the article was never in that District, was not found there, and could not be seized there. As the opinion of the Court of Appeals states in the *Fettig Canning Company* case, 188 F. 2d 715, 717 (C.A. 7), in which certiorari was denied by this Court (*supra,* p. 13):

> Title 21 U.S.C.A. § 334(a), on which the involved actions were predicated, provides, "Any article of food * * * that is adulterated or misbranded when introduced into or while in interstate commerce * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned *in any district court of the United States within the jurisdiction of which the article is found* * * * *" (Italics ours.) A proviso of this paragraph provides for the transfer of cases under certain enumerated circumstances, none of which it is claimed or appear to be relevant to the instant situation.
>
> No authority need be cited for the proposition that the jurisdiction of a Federal court is

> limited to that which Congress has expressly conferred. In view of the plain and unambiguous directive contained in the provision above quoted (italicized), it is not discernible how jurisdiction could be acquired by a District Court other than the one in whose territory the adulterated or misbranded articles were found. Jurisdiction has been made to depend upon that incident. A libel proceeding is one in rem against the contraband article, which is treated as the offender. *Cf. Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 57 * * *. The basis of all jurisdiction in rem is the court's actual or constructive possession; the res must be within the reach of the court. *United States* v. *Mack,* 295 U.S. 480, 484 * * *; *Strong* v. *United States,* 1 Cir., 46 F. 2d 257, 260 * * *.

This is also the view of all of the other courts in which the question of removal of a seizure action under Section 1404(a) has been considered.[2]

The language of 28 U.S.C. 1404(b) supports the view that Section 1404(a) was not intended to apply to in rem actions. Section 1404(b) provides:

> (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the

[2] *United States* v. *23 Gross Jars* * * * *Enca Cream,* 86 F. Supp. 824 (N.D. Ohio); *United States* v. *11 Cases, etc., Ido-Pheno-Chon,* 94 F. Supp. 925 (D. Ore.); *United States* v. *91 Packages* * * * *Nutrilite Food Supplement, etc.,* 93 F. Supp. 763 (D.N.J.).

> court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

It is obvious that the second sentence is meant to apply to transfers between divisions in the same district. The very fact that Section 1404(b) provides specifically for the transfer of in rem actions under certain circumstances from one division to another in the same district shows that Congress realized that such proceedings could not be transferred from one district to another district under Section 1404(a).

Petitioner's contention that Congress has conferred jurisdiction upon district courts to try seizure actions under Section 304 without territorial limitation is apparently based upon 28 U.S.C. 1345 and 1356. These sections are taken from Section 24 of the Judicial Code defining the original jurisdiction of the District Courts (28 U.S.C., 1940 ed., §41(1) and (3)) and define generally the subject matter of the general class of cases which the federal district courts are given the power to hear and determine. It is, however, fundamental that, in the absence of express authority by Act of Congress, the jurisdiction to hear the general classes of cases which the statute relegates to such courts is confined to the territorial limits of the districts es-

tablished by law. Under general provisions of law, a District Court cannot issue process beyond the limits of its district. *Robertson* v. *Labor Board,* 268 U.S. 619. The fallacy in petitioner's contention is that the power to adjudicate a particular case, as against the right to consider a general class of cases, cannot be exercised until a subject matter, or the parties, are brought into court so as to be subject to the court's power to act. *Toland* v. *Sprague,* 12 Pet. 300. A proceeding of this character must necessarily be brought in the District Court within the jurisdiction of which the article is found as is provided in Section 304 of the Act and generally in 28 U.S.C. 1395(b).

The decisions cited by petitioner do not in any way conflict with this fundamental rule as to the territorial limitations upon the jurisdiction of the federal district courts. *443 Cans of Frozen Egg Product* v. *United States,* 226 U.S. 172, was a seizure action brought under Section 10 of the Food and Drugs Act of 1906 (34 Stat. 768, 771) which is practically the same as Section 304 of the present Act. The question involved and decided was whether the proceeding was in admiralty so that the judgment of the District Court would be reviewable in the Circuit Court of Appeals by an appeal, or whether such proceeding was at law and reviewable only upon writ of error. The only question involved in *United States* v. *George Spraul & Co.,* 185 Fed. 405 (C.A. 6), was whether

previous executive seizure of the article is necessary to give the District Court jurisdiction to entertain the libel. These decisions do not in any manner support petitioner's contention that jurisdiction of a District Court extends to the territorial limits of the United States, or that the provisions in Section 304 and in 28 U.S.C. 1395(b) relate merely to venue.

Neirbo Co. v. *Bethlehem Shipbuilding Corporation,* 308 U.S. 165, and *Paramount Pictures* v. *Rodney,* 186 F. 2d 111 (C.A. 3), certiorari denied, 340 U.S. 953, both involved transitory actions in personam. The *Neirbo Company* case involved an injunction suit in which jurisdiction was based upon diversity of citizenship. The *Paramount Pictures* case arose out of a suit for treble damages under the Federal Anti-trust laws. In cases of that general character, it is the accepted doctrine that the applicable venue statutes (28 U.S.C. 1391 (b) and 15 U.S.C. 22) accord to the defendant a personal privilege which he may assert or waive at his election. But in a seizure action brought under Section 304 of the Act, the locus of the res is the essential fact which fixes the jurisdiction, since Congress has expressly conferred jurisdiction upon the court of the district wherein the article is found. Laws which prescribe generally where one may be sued do not apply to suits local in character. *Casey* v. *Adams,* 102 U.S. 66, 67-68. The ingenious method advocated by petitioner by which a waiver of venue

would supply the power and authority in a district court to remove a seizure action to any other district for trial cannot be seriously considered.

As noted above, the decisions are uniform in holding, as the court below held, that neither 28 U.S.C. 1404(a) nor Section 304 of the Federal Food Drug and Cosmetic Act can be applied to authorize the removal of seizure actions to another district for trial except as specifically authorized in Section 304.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

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